FILED
MAY 14 1957
JOHN T. FEY, Clerk

No. 889

In the

Supreme Court of the United States

OCTOBER TERM, 1956

KENNETH TALLEY,

Petitioner,

v.

SEARS, ROEBUCK & COMPANY,

Respondent.

PETITIONER'S REPLY BRIEF TO THE BRIEF IN OPPOSITION

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To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, Kenneth Talley, respectfully files this his reply to Respondent's Brief in opposition in order to draw this Honorable Court's attention to various parts of Respondent's Brief which might well otherwise misdirect and mislead this Honorable Court in its consideration of the disposition of this case.

I

Respondent's statement of the evidence of record in this case is grossly misleading. That statement omits all mention of the testimony in Petitioner's favor to show that in fact no help was made available to Petitioner and to show that the instruction to call in for help was not bona fide and that no other bona fide provisions for help were made.[1]

At page 8 of its brief in opposition, Respondent states that: "*Both Petitioner and Mr. Sims testified that two men would be sufficient to load and unload a freezer of the type which Petitioner was handling when allegedly injured.*" (Emphasis theirs.) This statement is completely out of context as far as Petitioner's testimony is concerned. Other testimony of Petitioner shows that this part of his testimony does not mean what it appears to mean as stated by Respondent. For Petitioner added: "If they had proper equipment, yes." (R. 90-93. Also see R. 96.)[2]

Respondent omits all testimony as to past injuries.[3]

Other information in Respondent's statement is pointed out at various places, infra.

II

Petitioner has not, as Respondent at page 11 of its brief in opposition indicates, asked this Court to grant certiorari merely to review the sufficiency of evidence.

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[1]Cf. Petition for Certiorari, pages 9-15.

[2]Cf. Petition for Certiorari, pages 9 and 10. Also see, *id.*, page 22, note 2.

[3]Cf. Petition for Certiorari, page 15.

(1) Petitioner contends rather that the Court of Appeal below has erroneously held that the Texas cases of *Western Union Tel. Co. v. Coker, 146 Tex. 190, 204 S. W. 2d 977 (1947); Great Atlantic & Pacific Tea Co. v. Evans, 142 Tex. 1, 175 S. W. 2d 249 (1943)*, and *Jackson v. Marshall, 243 S. W. 2d 205 (Tex. Civ. App. 1951)*,[4] compelled it to reverse the judgment entered for Petitioner by the trial judge below on the jury verdict that Respondent's negligence was the proximate and foreseeable cause of Petitioner's injury and Petitioner contends that the error of the Court of Appeals is so clear and patent that this Court should exercise its supervisory jurisdiction over lower federal courts and grant certiorari.

In the *Great Atlantic & Pacific Tea Co. v. Evans* case, *supra*, there was *no* evidence of any *past* injuries from which a jury could infer that the employer could have reasonably anticipated that Evans would be injured unless assistance by way of other employees or safe equipment was furnished him for the task assigned. Not only was there absence of that kind of evidence but there *was* evidence that other employers, in the same kind of business, customarily furnished no additional help or mechanical devices to do the kind of job Evans was assigned and which caused his injury. In the case at bar there *is* ample evidence of a history of past injuries to Respondent's employees, brought about by lifting heavy merchandise (see Petition

[4]See the Petition for Certiorari, page 26, the second full paragraph. Respondent, at pages 25 and 26 of its brief in opposition, cites other Texas cases. Those cases add nothing and are similarly clearly distinguishable, but Respondent fails to mention the facts which clearly show this.

for Certiorari, page 15); there was *no* evidence that other employers in the same kind of business customarily furnished no more than two employees to lift heavy freezers or furnished no better mechanical devices for country deliveries.[5]

In the *Western Union Tel. Co. v. Coker* case, *supra*, sufficient additional help had *in fact* been furnished but was not used and there were *in fact* additional employees readily available to assist but their help was not requested. There was *no* evidence that the employer had any hint that the helper assigned would absent himself, or that the assistance of the other available employees would not be requested if such absence did occur, or that the work assigned would be attempted without assistance. In the case at bar the

[5]Respondent, at pages 7 and 19 of its brief in opposition, implies that in order to prove that an employer has negligently failed to furnish sufficient help or equipment for work assigned, that there must be an affirmative showing that other employers furnish more help or better equipment for doing similar work. The Court of Appeals below seemingly accepted Respondent's implication in this respect. See Appendix A, Petition for Certiorari, at page 43, second paragraph from the bottom of the footnote. No Texas cases are cited to support such implication. And counsel for Petitioner has been unable to find any Texas cases which suggest this. In fact the converse was held in *El Paso Electric Co. v. Gregston, 170 S. W. 2d 515 (Tex. Civ. App., 1942).*

There are Texas cases which did turn on an affirmative showing that other employers *did not* furnish more help or better equipment than was furnished for the performance of the work which resulted in the injury sued on. E. g., see *Great Atlantic & Pacific Tea Co. v. Evans, 142 Tex. 1, 175 S. W. 2d 249 (1943).* But, of course, such negative evidence is the kind of evidence which a defendant-employer would ordinarily bring out by way of defense, if available. E. g., see *Cameron Compress Co. v. Whitington, 280 S. W. 527 (Tex. Comm. App., 1926),* where it was held that such negative evidence is admissible. In cases which have turned on such negative, defensive evidence, the evidence tending to show negligence was of the weakest kind. E. g., see *Great Atlantic & Pacific Tea Co. v. Evans, Ibid.*

In the case at bar, the Respondent did *not* even offer evidence that other employers did not furnish more help or better equipment than was furnished Petitioner in performance of the task which caused his injury.

regular help assigned was used; there is ample evidence that additional help was necessary to safely lift heavy items like a deep freeze;[6] there is ample evidence that such additional help was *not* available[7] and there is ample evidence from which a jury could, as it did in this case, infer that Respondent could have reasonably anticipated that it would be necessary to carry the deep freeze by hand[8] and that no

[6]See Petition for Certiorari, pages 9-10 and 15. It should be noted that the Court of Appeals below completely ignored the evidence on this point. See Appendix A, Petition for Certiorari, page 43, the first and second paragraphs from the bottom of the court's footnote.

[7]See Petition for Certiorari, pages 10-12. It should be noted that the Court's statement of the case completely ignores all the evidence which shows as spurious the claim that help would have been provided had Petitioner asked for it. See Appendix A, Petition for Certiorari, page 42, note 1.

[8]Luther Hudler, Respondent's Supervisor of Retail Deliveries, testified: "Q. When you picked up a load sheet, and say somebody is going to make a delivery on Route 4, Dallas— A. Yes, sir. Q.—That is out in the country? A. Yes, sir. Q. No street? A. No, sir. Q. The houses far apart? A. Yes, sir. Q. Maybe a farmer righ t in the middle of a 500 acre pasture? A. Yes, sir." (R. 44.)

When the deep freeze was sent out, Respondent's supervisor knew that it was being sent to Route 4, Dallas—out in the country. (See Petition for Certiorari, page 5.)

From the testimony quoted above and from what everyone knows, the jury could reasonably conclude that Respondent could reasonably anticipate that (ordinarily) there would *not* be sidewalks or other hard and smooth runway surfaces at places of delivery in the country.

There is ample testimony that the dolly Petitioner was furnished would not be adequate for moving heavy items like a deep freeze unless it were used on smooth concrete or other smooth, hard surfaces. (R. 92, 93, 100, 105.)

Respondent, at pages 6 and 19 of its brief in opposition, makes much of the fact that Petitioner was given the choice of two types of dollies and that he voluntarily chose the one issued to him. But this does not mean, that putting Petitioner to such a choice, discharged the duty owed by Respondent to furnish adequate equipment. However, that question is not in issue as there is ample testimony that the other type dolly "of choice" was not fit for the type work required of Petitioner, as big items like a deep freeze would be too tall and would come up over the handles of the dolly, making it impossible for a worker to get a safe grip. (R. 90-92, 107.) Thus Petitioner's "choice" was between two types of inadequate dollies.

Respondent, at page 6 (last full paragraph) of its brief in opposition, states that: "Other dollies were available on the loading dock if drivers desired or needed one * * * and no driver had ever been refused the use of a dolly which he had requested." This statement may be mis-

(Footnote No. 8, Continued on Page 6)

additional help would be requested[9] and that delivery would be attempted without the additional help needed.[10] True enough, some of the evidence introduced to refute defenses was circumstantial. However, *Neigut v. McFadden, 257 S. W. 2d 864, 870 (Tex. Civ. App. 1953—writ of error refused, no reversible error), cited with approval in Loud v. Sears, Roebuck & Co., 262 S. W. 2d 548, 556 (Tex. Civ. App. 1953)*, held that such is a proper way to negative the existence of facts. In the case at bar the circumstantial evidence adduced is clearly sufficient to justify a jury decision that the assertion—that other help could have been obtained—was nothing more than subterfuge.[11]

In the *Jackson v. Marshall* case, *supra*, not only were there other employees *in fact* at hand and available to help if they had been asked, but in addition the employee who

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(Footnote No. 8, Continued from Page 5)

leading in that it seems to imply that another type dolly other than the two types Petitioner was required to choose between, was available to drivers. In fact the record clearly shows from testimony of Respondent's supervisor that the "other dollies," spoken of in the above quotation from Respondent's brief in opposition, were just more of the same type of inadequate dollies Petitioner was required to choose between. (R. 50, 51, 52, 56.)

Thus from the foregoing, a jury could reasonably conclude, as it did, that Respondent could reasonably have anticipated that Petitioner would have to carry the deep freeze by hand; and as Respondent's agents also knew that a deep freeze is bulky and heavy and that its weight is much greater on one end than the other, the jury could reasonably find that Respondent could have or should have anticipated Petitioner's injury. (See Petition for Certiorari, pages 4, 5 and 7.) The additional evidence produced of a history of past injuries strengthens the reasonableness of the jury's finding of foreseeability of injury to Petitioner. (See Petition for Certiorari, page 15.)

It is clear from the Texas court decisions that the particular events or circumstances need not be anticipated; all that is required is that some similar event or circumstances could have been anticipated through the exercise of ordinary care. E. g., see *Carey v. Pure Distributing Corp., 133 Tex. 31, 124 S. W. 2d 847, 849 (1939).*

[9]See Petition for Certiorari, page 11.

[10]See Petition for Certiorari, pages 14, 15.

[11]See Petition for Certiorari, pages 10-14.

was injured had control over the weight of the load to be lifted; there was no way the employer could have known how much weight the employee had undertaken to carry. In the case at bar the weight was a fixed quantity over which the Petitioner had no control and the employer knew that weight.[12]

From the foregoing, it can readily be seen that the three cases relied on by the Court of Appeals below (as *compelling* it to hold as it did) involved evidence or lack of evidence so crucially different from the evidence in the case at bar that even without more those cases are patently not controlling in the case at bar. And that the Texas Supreme Court did not comprehend that its holdings were to be read so broadly is clearly shown by the part of the *Western Union Tel. Co. v. Coker* case, *supra*, quoted (strangely enough) by Respondent at page 21 of its brief in opposition.

(2) And further, Petitioner is contending that the holding of the Court of Appeals below, that the three cases relied on (discussed above) are applicable and controlling in the case at bar, is in direct conflict with the holding of the Texas Court of Civil Appeals for Dallas in *Loud v. Sears, Roebuck & Co., 262 S. W. 2d 548 (Tex. Civ. App. 1953)*. The Texas court in that case, which involved operative facts on the issue of negligence and foreseeability

[12]See Petition for Certiorari, pages 4, 5 and 7.

which are weaker than those in the case at bar,[13] held that the three cases discussed above were not only not controlling but that they were not even applicable. The holding in the *Loud* case, *supra*, has never been disapproved by the Texas Supreme Court. This Court has held that in such a situation the federal courts are bound by the state intermediate appellate Court holding, in the absence of convincing evidence that the law of the state is otherwise. *Six Companies of California v. Joint Highway Dist. No. 13, 311 U. S. 180, 85 L. Ed. 114 (1940); West v. American Tel. & Tel. Co., 311 U. S. 223, 85 L. Ed. 139 (1940).* Other than relying on the very cases held by *Loud* to be inapplicable to a case like

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[13]In the *Loud* case, a statement by the employer's agent that help would be furnished was held to be sufficient evidence to allow a jury to infer that the need for help was known and to be sufficient to support a jury finding that there was a duty to furnish help. Also, in *Loud* it was held: that it was for the jury to decide whether or not the specific direction to do the work (which resulted in injury) superseded a general order to lift no more than could be lifted with safety.

In the case at bar there is the clearest kind of evidence to show (and a jury would most certainly be justified in finding as it did) that Respondent did not purpose to send the needed extra help out on rural routes and pay them for the entire day just to assist in making delivery of one item at an address on the route. See Petition for Certiorari, page 10-12. And the evidence clearly shows (and a jury would most certainly be justified in finding as it did) that Respondent could reasonably anticipate that *more* help than was ordinarily furnished for run-of-the-mill deliveries was needed when unusually large, heavy items like a 361 pound deep freeze were to be delivered out in the country. See Note 8, supra.

And the evidence clearly shows (and a jury would most certainly be justified in finding as it did) that the other alternatives asserted to be available to Petitioner were illusionary and nothing more than subterfuge. See Petition for Certiorari, pages 10-15. Also see Note 7, supra.

In fact the very illusionary nature of the alternatives, some of which employees are instructed about, makes this an even stronger case than *Loud*, as it more clearly shows guilty knowledge on the part of Respondent that additional help necessary for safety is many times not furnished (E. g., when heavy items are to be delivered in the country) when needed and that the equipment furnished will not make up for that deficiency. See Note 8, *supra*. Also see Petition for Certiorari, pages 11, 12, 15.

Respondent, however, at page 14 of its brief in opposition, argues that the *Loud* case is immaterial. But see pages 9-13, *supra*.

the case at bar, Respondent in its brief in opposition points to no evidence that the law of Texas is otherwise than as held by the Texas Court of Civil Appeals in *Loud, supra.*[14] Even if the cases held inapplicable in *Loud* are not patently inapplicable they are nevertheless not clearly applicable. And there is further evidence that the law of Texas is *not* otherwise than as held by *Loud.* See *Sears, Roebuck & Co. v. Robinson, 154 Tex. 336, 280 S. W. 2d 238 (1955).*[15]

III

Respondent asserts at page 16 of its brief in opposition that the Court of Appeals below is not bound by Texas Courts' of Civil Appeals decisions that the modicum of proof required in testing the grant of summary judgment is the same as the modicum of proof required in testing a

[14]No federal decisions are cited, however, to support such a novel argument, other than cases which did not involve the problem. The cases cited only speak generally of "convincing evidence" that the law of the state is otherwise than as held by an intermediate court of the state. That such "convincing evidence" must be gathered from sources not involved in the very intermediate court decision being considered is clearly indicated by what this Court said in *Six Companies of California v. Joint Highway Dist. No. 13, 311 U. S. 180, 85 L. Ed. 114 (1940),* and *West v. American Tel. & Tel. Co., 311 U. S. 223, 85 L. Ed. 139 (1940).*

Thus Respondent is only arguing that the *Loud* case is wrong and should not be followed by federal courts. But Respondent does not show by any means that the Supreme Court of Texas would not make the same distinctions made in the *Loud* case. To the contrary there is clear and "convincing evidence" that the Supreme Court of Texas will make the very distinctions made in *Loud* by the Texas Court of Civil Appeals for Dallas, if the question is ever raised in the Texas Supreme Court. E. g., see *Sears, Roebuck & Co. v. Robinson, 154 Tex. 336, 280 S. W. 2d 238 (1955),* discussed at page 14, infra.

Petitioner has not and does not argue, as Respondent asserts at page 12 of its brief in opposition, that any of the Texas decisions relied on by Respondent are wrong. This assertion is just a strawman. Petitioner contends only that Respondent and the Court of Appeals below rely on Texas cases which are quite beside the point and that to apply them to require that Petitioner be deprived of the jury verdict below is a gross misapplication of those cases and creates a rule of law to be applied by federal courts in the Fifth Circuit which is in direct conflict with applicable Texas state court decisions.

[15]See page 14, infra. See also Petition for Certiorari, page 34.

grant or denial of a motion for an instructed verdict. (See Petition for Certiorari, pages 28-31.) Respondent asserts that such question is a procedural matter and quotes at page 16 (of its brief in opposition) from *5 Moore's Federal Practice (2d Ed.) 102* for support. Whether or not the *Moore* quotation would be sustained by this Court, it clearly has nothing to do with any issue raised in or passed on by the Court of Appeals below.[16] The Court of Appeals below did not base its decision on any idea expressed by the *Moore* quotation; it held, that *as a matter of Texas law*, that there is no legal basis for a finding that Petitioner's injuries were proximately caused by any negligence on Respondent's part, and that Respondent's motion for an instructed verdict should have been granted. Three Texas cases were relied on as requiring that conclusion.[17] The patent inapplicability of those cases to the case at bar is shown at pages, 3-7, *supra*, and at pages 17-28 in the Petition for Certiorari. Not only are those cases patently inapplicable *per se*, but they were held by the Texas Court of Civil Appeals for Dallas[18] to be applicable in a case *(Loud v. Sears, Roebuck & Co., 262 S. W. 2d 548)* involving weaker inferences of negligence than the inferences which may reasonably be made in the case at bar.[19] The Court of Ap-

[16]Respondent's quotation from *Moore* is just another strawman, built up to be knocked down, and in the process to confuse the issue.

[17]*Western Union Tel. Co. v. Coker, 146 Tex. 190, 204 S. W. 2d 977 (1947); Great Atlantic & Pacific Tea Co. v. Evans, 142 Tex. 1, 175 S. W. 2d 249 (1943);* and *Jackson v. Marshall, 243 S. W. 2d 205 (Tex. Civ. App., 1951).* Also see Note 4, supra.

[18]Had this case not been removed by Respondent to the federal district court below, and had this case been tried instead in the state court where suit was filed, this is the Texas Court of Civil Appeals in which review would have been had.

[19]Cf. pages 3-7, supra, with Note 13, supra.

peals below considered the *Loud* case but refused to follow its necessary holding that the three Texas cases (relied on by the Court of Appeals as controlling)[20] have no application to a case like the case at bar. Thus the Court of Appeals has applied, as controlling, cases which *Loud* held not only *not* controlling but *not even* applicable. Unless *Loud* itself can be distinguished from the cases held inapplicable in *Loud*, then the Court of Appeals below in applying those cases to the case at bar, as not only applicable but controlling, has done so in square conflict with the *Loud* case.

Loud cannot be put to one side on the ground that it is "convincingly" wrong[21] and the Court of Appeals below makes no attempt on that ground to distinguish *Loud* from the cases held inapplicable by *Loud*. However, the Court of Appeals did give what appears to be three other reasons for distinguishing *Loud* from the cases held inapplicable in *Loud*. That two of these reasons (see Petition for Certiorari, page 27) are not valid is not denied by Respondent in its brief in opposition.

The third and last possible reason for distinction is clearly invalid also. The Court of Appeals said in its opinion: "The Loud case, 262 S. W. 2d 548, which appellee [Petitioner] cites as supporting his position, was an appeal from a summary judgment."[22] That and other language makes it appear that the Court of Appeals' refusal to follow the *Loud* holding, in respect to the cases distinguished in

[20]See page 3, supra.
[21]See pages 7 and 8 and Note 14, supra.
[22]See Appendix A of the Petition for Certiorari, pages 41, 49.

Loud, was based on the notion that, for some reason or other, a holding in a case involving review of the grant[23] of a motion for summary judgment (the *Loud* case) never has any binding application in a case involving review of the grant or denial of a motion for an instructed verdict (the cases held inapplicable by *Loud)*. Clearly such a notion cannot validly be based solely on the difference in the names of the motions. The only other conceivable basis for such a notion is that a different standard is used by the Texas courts for testing the sufficiency of the evidence in each type case; i.e., that the modicum of proof required to overturn on review the grant or denial of an instructed verdict for a defendant is greater than the modicum of proof required to reverse on review the grant of summary judgment for a defendant. Whatever may be the difference in standard applied by the federal courts in testing the sufficiency of the evidence in the very case being tried, it seems clear beyond argument that if the applicable substantive law is state law, then the federal courts may not, for the purpose of *determining the statute of that law*, distinguish *between* the state's court decisions on a ground that none of the state's courts have made and many have denied. That is the point made in the Petition for Certiorari beginning at page 28. All the Texas appellate courts which have passed on the point have held that there is no difference in the standard applied in testing a grant of summary judgment and a grant or denial of an instructed

[23]The reasons for not including "or denial" here in making the comparison is pointed out in the Petition for Certiorari at page 31.

verdict.[24] And one of the very appellate courts of Texas, which has held this, is the court which decided the *Loud* case.[25] Therefore, in determining the status of Texas law of negligence, the Court of Appeals cannot, without being in square conflict with other Texas court decisions, rely on a difference in modicum of proof as an excuse for refusing to follow the *Loud* holding in respect to the cases distinguished in *Loud*. That is the point Petitioner makes about modicum of proof in his petition for certiorari[26] and Respondent's quotation, from *Moore*, has no bearing on that point whatsoever. Thus the *Moore* quotation, at page 16 of Respondent's brief in opposition, serves no other purpose than as a strawman, built up to be knocked down, and in the process to confuse the issue.

There being no conceivable valid basis[27] for distinguishing *Loud* in making the determination of *the status of Texas substantive law of negligence*, the Court of Appeals below, in holding cases controlling which were held inapplicable in *Loud*, has decided a question of state law in a way that is in direct conflict with the *Loud* case.

IV

In the paragraph beginning on page 17 of Respondent's brief in opposition, Respondent mixes two issues as if only one is being spoken of and this is misleading. One of the

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[24]See Petition for Certiorari, page 29.

[25]*Mesquite v. Scyene, 295 S. W. 2d 276, 281 (Tex. Civ. App., 1956—writ of error refused, no reversible error).* See also, Note 18, supra.

[26]See Petition for Certiorari, pages 28-31.

[27]Respondent in its brief in opposition suggest no other possible reason.

issues is whether under Texas law, the test of a grant of a summary judgment is the same as the test applied to a motion for an instructed verdict. The Texas intermediate court decisions that Respondent speaks of, hold that the test is the same. There is no Texas Supreme Court decision involving this precise question. The Court of Appeals below is bound to follow the intermediate courts' decisions in this respect therefore.[28] Only after the foregoing has been concluded does the second issue of Respondent's statement come into the picture: Can the Texas Supreme Court decisions distinguished in *Loud* be used in a *Loud* type situation to relieve the federal courts of the duty of following *Loud*, absent any other indication to the contrary as to what the Texas law is in relation to the *Loud* type situation; and if so, are those cases persuasive that the Texas law is other than *Loud*[29]—especially in view of *Sears, Roebuck & Co. v. Robinson, 154 Tex. 336, 280 S. W. 2d 238 (1955)?*[30]

V

Respondent's argument beginning with the last paragraph on page 23 and ending on page 26 of its brief in opposition, flies in the teeth of the Texas Supreme Court decision in *Sears, Roebuck & Co. v. Robinson, supra.* In that case the employee knew of the danger, he knew the oil was

[28]See pages 9-13, supra. Also see *Six Companies of Calif. v. Joint Highway Dist. No. 13, 311 U. S. 180, 85 L. Ed. 114 (1940); West v. American Tel. & Tel. Co., 311 U. S. 223, 85 L. Ed. 139 (1940).*

[29]That would be a strange result indeed. Certainly the Court of Appeals below reached no such conclusion, as it distinguished the *Loud* case on other grounds and did not, therefore, have to consider the problem. See pages 9-13, supra.

[30]See Text immediately following. Also see, Petition for Certiorari, pages 34-37.

on the floor, but he nevertheless thought he could cross it without slipping. He started across, slipped and was injured. The Texas Supreme Court held that such was evidence of assumption of the risk, which is not a defense in an action against an employer who is eligible for but has failed to subscribe to workmen's compensation coverage; and that such knowledge or action on the part of the employee in no way relieved the employer of its duty to furnish a safe place to work.[31]

In Texas it is well settled that an employer has a duty to furnish his employees with safe instrumentalities and a safe place to work. It is also settled law in Texas that an employer has the duty to exercise reasonable care in providing his employees with adequate help in the performance of work required of them. Both duties are continuous and non-delegable.[32]

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[31]What the Petitioner thought he could do in the case at bar undoubtedly influenced the Court of Appeals below as can be seen from the prominence given, in its statement of the facts, the testimony about this. See the Petition for Certiorari, Appendix A at page 43, last paragraph of the Court's footnote 1. *But cf.*, Petition for Certiorari, page 22, note 2.

In addition, Respondent, in its brief in opposition, talks about the particular driveway involved and the unforeseeability of the particular circumstances there, as if Petitioner is contending that Respondent should have foreseen the particular events which precipitated the injury. See the Petition for Certiorari, page 36, last paragraph. That Respondent's similar stress in the Court of Appeals below had the undoubtedly desired diversionary effect is indicated by the words used by the Court of Appeals below to stress the particular circumstances which precipitated Petitioner's injury. See paragraph 5 of footnote 1 of the Court of Appeal's opinion, reprinted at page 42 of the Petition for Certiorari. All that is required under Texas court decisions, however, is that some similar event could have been foreseen through the exercise of ordinary care. E. g., see *Carey v. Pure Distributing Corp., 133 Tex. 31, 124 S. W. 2d 847, 849 (1939).*

[32]*Western Union Tel. Co. v. Coker, 146 Tex. 190, 204 S. W. 2d 977, 987 (1947); Morgan v. State, 170 S. W. 2d 648 (Tex. Civ. App., 1942), reversed on other grounds, 140 Tex. 620, 170 S. W. 2d 652 (1943).*

Viewing the Court of Appeals decision below for what it really does, the following seems apparent:

The non-delegable duty to furnish employees with adequate help and safe instrumentalities can now be delegated if it is delegated to the very employee to whom the duty is owed, and as a bonus for doing this the lack of the defense of assumption of the risk is no longer a disability as what would otherwise be a question of assumed risk is turned into a question of primary negligence, provided however that suit for injury is brought in or removed to a federal court in the Fifth Circuit.

It seems apparent that in the case at bar the Court of Appeals below not only usurped the function of the jury but, while purporting to follow Texas law, has cut through and refused to follow controlling Texas court decisions in order to reach a result which no doubt accords with its view of what the Texas law should be.[33]

VI

This case does not, as Respondent asserts, involve the rights of just Petitioner; the Court of Appeals below has decided right-out-of-the-window the protection afforded employees by Texas law in situations where their employers are eligible for but have refused to subscribe to a workmen's compensation plan. The decision below will affect the rights of the many thousands of employees who work in

[33]See *Gibson v. Phillips Petroleum Co., 1 L. Ed. 77 (1956) (No. 339, Oct. Term, 1956)*, where this Court reversed the Court of Appeals for the Fifth Circuit for acting similarly.

Texas for foreign corporations, as such employers can be trusted to set up a plan of defense by the same or similar methods of subterfuge adopted by Respondent in this case. And, when an injury occurs and suit is brought, those employers can be trusted to remove the case to a federal court in order to get the benefit of the decision of the Court of Appeals below and have the subterfuge upheld. The decision below has the effect of emasculating the Texas policy regarding workmen's compensation.[34] It is therefore important that this Honorable Court grant a writ of certiorari as prayed.

Respectfully submitted,

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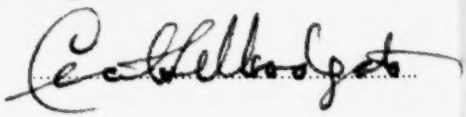
Gulf States Building,
Dallas, Texas.

[34]Respondent, at page 12 of its brief in opposition, argues that no decision by this Court in this case will in any way bind the Texas courts. That statement is another strawman. Petitioner has made no such argument but to the contrary contends that the decision of the Court of Appeals should be reversed on the ground that it is at gross odds with applicable Texas court decisions in: *Loud v. Sears, Roebuck & Co., 262 S. W. 2d 548 (Tex. Civ. App., 1953); Neigut v. McFadden, 257 S. W. 2d 864 (Tex. Civ. App., 1953); Carey v. Pure Distributing Corp., 133 Tex. 31, 124 S. W. 2d 847, 849 (1939),* and *Sears, Roebuck & Co. v. Robinson, 154 Tex. 336, 280, S. W. 2d 238 (1955).*

A copy of the foregoing Reply Brief to the Respondent's Brief in opposition to the grant of a Writ of Certiorari in this case was on the 14th day of May, 1957, served on Mr. Pinkney Grissom and the firm of Thompson, Knight, Wright & Simmons, Republic National Bank Building, Dallas, Texas, Attorneys for Respondent.



JUN 13 1957
JOHN T. FEY, Clerk

No. 889

In the

Supreme Court of the United States

OCTOBER TERM, 1956

KENNETH TALLEY,
Petitioner,

v.

SEARS, ROEBUCK & COMPANY,
Respondent.

PETITION FOR REHEARING

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and

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